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The Referendum on Catalan Self-Determination: Long Shots and Legal Flair

MIRIAM BAK MCKENNA — 27 September, 2017



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The image conjured by the first subtitle of [Zoran Oklopčič's post](#) on the referendum on Catalan self-determination, that of a zombie self-determination resurrected from its post-Kosovan resting place and back to haunt international legal rhetoric perfectly captures the mood amongst many in the international community who had perhaps been hoping that the rhetoric of self-determination had all but given up the ghost. As Oklopčič underlines, the past 15 years have seen a dramatic decline in the use of self-determination as a means to frame independence claims by sub-national groups. Unlike the eagerness to embrace self-determination that was witnessed during the break-up of the FSRY, the vocabulary used by the Montenegrin (2005), Scottish (2013), or Kosovar parliaments (2008) indicated a hesitation to appeal directly to principle either jurisprudentially or normatively. While alluding to the principle's conceptual foundations in their appeals to popular sovereignty and 'the will of the people' these movements consciously avoided the term, while in the case of Catalonia, the Catalan parliament has invoked it explicitly.

I would differ slightly in my reading of the Catalan Self-Determination

Referendum Act and its invocation of self-determination, however. Oklopcic interprets the claim to self-determination as one appealing to its remedial aspects that arise in cases of a 'failure of a sovereign state to act in conformity with the minimal standards of political legitimacy'. This failure in the case of the Catalans is the Spanish government's unresponsiveness, indeed indifference to Catalan autonomy aspirations. In the second part of his post, Oklopcic argues that the Catalans were emboldened by recent constitutional developments in other parts of the world, namely Canada and Scotland, which, he notes, 'both offered a vision of a liberal-democratic constitutional order whose legitimacy in good part hinges on the way in which it addresses democratically manifested, minoritarian political aspirations.' For Oklopcic, the Catalan claim is built upon a constitutional claim centred on frustrations arising from the decision of the Spanish Constitutional Tribunal to strike down parts of the 2006 Statute of Autonomy of Catalonia amounts to 'the breaking of the Spanish constitutional pact of 1978', and the failure of the Spanish state 'to guarantee for the people of Catalonia full recognition, representation and participation in the ... life of the Spanish state without any form of discrimination'. On the basis of any of the constitutional arguments made in the Scottish or Canadian context, he concludes quite rightly, there is nothing to justify a transplantation of similar legal logic to the Catalan claim.

Frankly put, by any stretch of the constitutional or international legal imagination, the Catalans do not have a legal leg to stand on, and they are no doubt well aware of this fact. Instead, I would argue, they rely upon a broadly defined, and highly aspiration appeal to the conceptual core of self-determination as an international legal principle. Theirs is a carefully crafted appeal to the democratic rather than the nationalistic aspirations of self-determination, one less juridical than political in nature. On any reading of the so-called 'remedial right' to self-determination, their grievances fall far short of the degree of discrimination that has been seen to be required by even the most enthusiastic supporters of this precarious legal idea. Indeed, despite having previously made the claim that Catalan independence represents the *'last resort to remedy an unjust situation'* in the 2014 White paper on The National Transition of Catalonia, the Catalanian government seems to have back-pedalled on this point in recent

months. Moreover, while there are allusions to a form of latent colonialism in the Catalan relationship to Madrid, and many during the independence campaign have expressed this claim explicitly, the Referendum document refrains from directly invoking this as a legal claim. They have reached an impasse, and faced with no concrete domestic or international legal basis they have constructed a claim based on two unique readings of the judicial construction of self-determination.

The first invokes the open-ended reading of the ICJ's assessment of independence claims falling outside of the decolonisation paradigm in the *Kosovo Advisory Opinion*. In this construction, secession is a factual situation to which international law responds but does not anticipate. In its assessment of such claims the Court refrained from ruling on the existence of any positive entitlement to secede, nor did it point to any rule prohibiting the making of a declaration of independence, stating 'it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.' The Court deftly left the question of non-imperial claims to independence wide open, seemingly implying that such instances would be assessed on the individual character of each claim. A similar argument was used by Martti Koskenniemi in Finland's submission in assessing self-determination's application in situations of 'abnormality, or rupture, or revolution, war, alien subjugation or the absence of a meaningful prospect for a functioning internal self-determination regime' (Written Statement by Finland, p. 4 para 9). Rather than a 'rule' of remedial secession, Koskenniemi notes that "it is better to think of this as part of the traditional law of self-determination that was always to be balanced against territorial integrity and contained the possibility of its application, as the Aaland Islands case demonstrates, through an external solution." However, for Koskenniemi, and others, like Nathaniel Berman, such applications of self-determination arise in 'moments of rupture':

The discourse of self-determination flourishes in the conceptual and real hiatuses in international society. Rather than being positioned on one side or another

in the law/sovereignty dilemma, it weaves a textured discourse between them. In this way, its very marginality to normal international law enables it to occupy a privileged conceptual role in international law, illuminating law's basic conceptual dilemmas. (Berman, 1988, p. 56)

It is in these spatial gaps of sovereignty that self-determination comes to the fore. For instance, in the 1920 Aaland Islands matter, the Commission of Jurists presented self-determination not as a right in international law, but as a fundamental principle that only comes into play when organised state sovereignty is disrupted. The Jurists articulated this distinction between normal and exceptional situations as “*situations de droit*” and “*situations de fait*”. In situations when State sovereignty itself is in question, “*soit qu'il se trouve dans une période de transformation ou de dissolution*”, the principle finds its application. In this sense, self-determination which is usually dormant, operates as a legal stop-gap in instances of inchoate sovereignty.

There are historic reasons why the Catalans want to go their own way. They invoke the historical ‘legitimacy’ of their claim and the ‘legal and institutional tradition of the Catalan people – interrupted, over the course of the centuries, only by force of arms’, clearly seeking to underline the unique political, social and cultural history upon which they base their claim to independence, and which they will be persuasive to the international legal community. However, it is a stretch to commute this historical legacy into a rupture in the present sovereign regime. Moreover, there is nothing that would outwardly give credence to the Catalan claim as *sui generis* from other independence movements. Instead they must rely upon the broadest possible reading of the Court sidestepping the legal implications of independence claims and ultimately leaving the matter in the hands of the international legal community to assess each claim on a case-by-case basis, rather than on the basis of a positive legal entitlement. It is a slippery and imaginative legal argument that appeals more to the political realities of international state creation than any firm judicial stance, but at this stage they have to work with what they have...which isn't much in the current international legal climate.

The second aspect of the Catalan claim is one centred on a democratic reading of self-determination, both in terms of the ongoing need for democratic participation and the actual referendum vote. The reference in the Referendum document to self-determination as ‘the first human right’ as contained in both the ICCPR and ICESCR, along with Resolution 1999/57, Promotion of the Right to Democracy, which invokes self-determination, again appeals to a broad and creative reading of self-determination. Within this context, they argue, ‘democratic management of public affairs has been internationally accepted as one of the cornerstones of contemporary society – ‘inextricably linked to, amongst other rights, that of citizens’ direct and indirect political participation and to the right to freedom and to human dignity, including freedom of expression and opinion, freedom of thought and freedom of association’. During the 1990s, political participation, democratic government, good governance, free and fair elections, and public accountability became increasingly referred to as falling within the rubric of ‘internal’ self-determination, which was said to create international standards regarding the form and function of a state’s internal political order. It is only recently, however, that we have begun to see the logic of internal self-determination being used to advance claims to independence. In this respect, the Catalan claim shares similarities with the Scottish referendum, the crucial difference of course is the support from the central government, or lack thereof in the case of Spain. In contrast to the ethno-nationalism that precipitated the fall of the FSRY, the Scottish referendum was focused predominantly on issues of democracy and governance and the fundamental issue of creating a Scottish state responsive to the needs of Scottish constituents. Debates centred less on issues of nationalism and more upon the highly-centralized Westminster system, which still controls much of the economic decision making of its Union components, the “democratic deficit” of the constitutional order in greater Britain and on a political system that no longer accommodates the best interests of Scottish voters. The Scots, however, built their claim around vague appeals to the Scottish people’s ‘right to decide’, focusing on their constitutional right to ‘determine their own constitutional future’, with little mention made of self-determination. Recently, however, there seems to have been a resumption in the rhetoric of self-determination in Scottish debates on independence. The doctor Frankenstein who has arguably resurrected self-

determination into popular parlance is Theresa May in her assessment of Brexit as an exercise of British 'national self-determination'. The Scots followed suit shortly thereafter with their own appeals to self-determination.

Similarly, in the case of Catalonia, earlier references to the 'Catalan nation' in the White Paper on the The National Transition of Catalonia have been eschewed in favour of a democratic focus on popular sovereignty, democratic legitimacy and the democratic rights of the 'Catalan people'. Unlike the Scots however, the Catalans are largely unable to rely upon any domestic, constitutional basis for holding the referendum, and instead appeal to an international legal right of democratic participation.

Concluding Remarks

In Catalonia, we are seeing the use of self-determination as a legal principle that reaches beyond law to its sources of normative authority, which lay outside the existing legal order. In this case self-determination's position as an ethical standard setting principle for statehood, based upon the dialectical relationship between people and State. The Catalans lack a firm legal basis for their claim, and the referendum is perhaps built more on its blunt symbolism than anything concretely judicial. Self-determination's enduring appeal, however, lies precisely in its conceptual and judicial malleability. Through its historical relationship to the evolution of sovereignty as both a political and legal institution, self-determination has come to occupy a unique position between the concepts of international law and state sovereignty – concepts which it may both challenge and affirm – creating an important aperture in the international legal order. For this reason, self-determination has acted as an important rhetorical norm of legitimacy for various actors in their political struggles.

Perhaps sufficient time has passed from the rampant ethno-nationalism of post-Cold War self-determination claims to resurrect the principle for modern international legal use without the fear of automatically disqualifying the claim from contention. Perhaps Brexit had a hand. Whatever the reason, the Catalans clearly believe it will

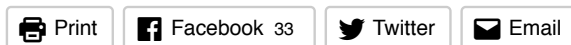
lend credence to their claim to independence. Although for the Catalans, the outcome is likely to be decided in the manner outlined in Marx's aphorism: 'Between equal rights, force decides' (Marx, 1976, p. 344). With Madrid now making moves to take over policing in the region in order to stop the vote, after already seizing voting materials, imposing fines on top official and arresting dozens of politicians, the actions of the central government in driving a further rift in a divided region may ultimately prove to be their best chance yet of moving towards independence.

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